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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/629,869

07/30/2003

David Gamsarik

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04/27/2009

MCGINN INTELLECTUAL PROPERTY LAW GROUP, PLLC

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SUITE 200

VIENNA, VA 22182-3817

EXAMINER

SOREY, ROBERT A

ART UNIT

PAPER NUMBER

3626

MAIL DATE

DELIVERY MODE

04/27/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/629,869

Applicant(s)

GAMARNIK ET AL.

Examiner

ROBERT SOREY

Art Unit

3626

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 03 April 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because:
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-24.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/C. Luke Gilligan/
Supervisory Patent Examiner, Art Unit 3626

/R. S./
Examiner, Art Unit 3626

Continuation of 3. NOTE: The amendment including the calculating of a risk value could raise new issues that would require further consideration and/or search.

Continuation of 11. does NOT place the application in condition for allowance because:

Applicant's arguments are not persuasive. Concerning claim 1, Applicant mostly offers opinions which are not a suitable substitute for argument and evidence. No suitable explanation as to how or why the claims presented are distinct from the combination of Alexander and Benbassat was given that did not amount to intended use. Applicant asserts that because Alexander's invention can be used in a disaster recovery service, there is "little in common" with the claims which are directed towards a disaster recovery process. This is not persuasive. Applicant argues that the modification of the Alexander reference was improper because no reasonable motivation was provided; hence, Applicant concludes that Alexander does not teach the execution of a risk model; however, Alexander was properly combined with Benbassat using KSR rationale, and Applicant has failed to consider and argue the Benbassat reference as combined with Alexander. Applicant improperly attacks the Alexander in isolation. Applicant further points out three alleged flaws, the first of which concerns the amendment which has not been entered. The second point is based on Applicant's opinion that the Examiner has not established a prima facie rejection; however, Applicant has offered no argument or evidence outside of opinion and intended use statements to support this conclusion. Applicant's third point is that the Benbassat reference is not related to disaster recover or a model that simulates a disaster, but Applicant offers no explanation as to why or how. As stated in the rejection, the Benbassat model is a statistical risk model for predicting problems and checking possible solutions. The Alexander and Benbassat references reasonably pertain to the particular problem with which Applicant is concerned and were correctly combined as per MPEP 2141 (III) to meet the claimed invention. Therefore, the claims 1-24 are rejected.